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Supreme Court of the United States

OCTOBER TERM, 1979

FREEDOM INSTITUTE OF AMERICA, FREEDOM CHURCH OF REVELATION, ORDER OF FREEDOM OF CHOICE, REVEREND JEROME HEINEMAN,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below

The Order of the New Jersey Supreme Court denying Petitioners' Motion for Leave to Appeal and to Stay an Order of the Superior Court of New Jersey, Appellate Division, appears in Petitioners' appendix at 3a. The

Order of the Superior Court of New Jersey, Appellate Division, denying Petitioners' Motion for Leave to Appeal and to Stay an Order of the Superior Court of New Jersey, Law Division, appears in Petitioners' appendix, at 1a. The Order of the Superior Court of New Jersey, Law Division, denying Petitioners' Motion to Quash or Limit for Subpoena Duces Tecum is set out in Petitioners' appendix at 1a.

Constitutional Provisions Involved

First Amendment to the United States Constitution (1791):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution (1791):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution (1868):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

On January 28, 1980, in conjunction with a State Grand Jury investigation, grand jury *subpoenas duces tecum* were served on the Freedom Institute of America, Freedom of Choice, Life Science Church of Positive Thinking, and the Universal Life Church.

On February 11, 1980, the Honorable George Y. Schoch, after a hearing, denied a motion to quash and a motion for a stay. The return date of the subpoenas was adjourned until February 21, 1980, to allow appellant to seek leave to appeal the denial of the motions to the Appellate Division. On February 20, 1980, the Appellate Division (Judges Matthews, Ard and Polow), denied the application for leave to appeal. An application for leave to appeal was made to this Court and denied on March 3, 1980.

On March 6, 1980, appellant filed a 42 U.S.C. 1983 action in Federal District Court and applied to Judge Lacey for emergent relief enjoining enforcement of the sub-

poenas. After a hearing, the application was denied. On March 10, 1980, Justice William J. Brennan, Jr., denied an application for a stay in the matter. The return date of the subpoena had been adjourned to March 11, 1980 to accommodate these appeals. On March 24, 1980, a stay was denied by the full Court.

On March 12, 1980, after a hearing, Judge Schoch found that the petitioner, admitting that he was the custodian of records for Freedom of Choice and Freedom Institute of America and in possession of the subpeonaed records of these organizations, had refused to comply with the subpoenas by producing the documents in question. Judge Schoch found the petitioner in contempt and ordered him incarcerated pending compliance with the State Grand Jury subpoenas.

On March 15, 1980, the Honorable John W. Fritz, J.A.D., denied an emergent application for a stay of Judge Schoch's order.

On April 18, 1980 petitioner filed a petition for a Writ of Habeas Corpus. The petition was dismissed the same day by the Honorable Dickinson R. Debevoise, U.S.D.J., for failure to exhaust State remedies in that no direct appeal was taken of Judge Schoch's order. A motion to reconsider the dismissal was denied May 12, 1980.

Notice of Appeal was filed April 18, 1980. An amended Notice of Appeal was filed May 16, 1980. (The State did not receive notice of these filings until the proceedings at Justice Handler's Chambers.)

On May 21, 1980, Honorable Morton I. Greenberg, J.A.D., denied petitioner's motion for a stay of Judge Schoch's order pending appeal.

On May 22, 1980, Justice Handler denied petitioner's motion for a stay, finding the organizations in question

were the subject of a *bona fide* investigation and that there was no sufficient probability of success on appeal. The denial was without prejudice to file a reapplication to the full court on Tuesday, May 27, 1980. The motion for the stay was denied on May 28, 1980.

REASONS FOR DENYING THE PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

POINT I

The petition presents no constitutional questions which have not been previously decided by this Court.

Petitioner challenges the subpoenas issued in the course of a criminal investigation which compel production of the financial records of a purported religious organization in question on two grounds. First, he alleges that production would violate his Fifth Amendment right against self-incrimination. Second, petitioner alleges that the subpoenas violate his rights under the Free Exercise clause.

The petition presents no constitutional questions which have not been previously decided by this Court against the contentions advanced by defendant.

It is well settled law that an individual custodian of financial records of an unincorporated association has no standing under the Fifth Amendment to withhold financial records of that association which are the subject of a grand jury subpoena. *United States* v. *Bellis,* 417 U.S. 85 (1974); *United States* v. *White,* 322 U.S. 694 (1944); *Wilson* v. *United States,* 222 U.S. 361 (1911). As the

Court noted in *Bellis,* relying on *White,* the privilege is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records," See also *In re Grand Jury, Empanelled February 14, 1978,* 597 F. 2d 851 (3 Cir. 1979).

More recently this Court has had occasion to rule on the question of whether the free exercise clause or freedom of association under the First Amendment provide any basis for withholding financial records subpoenaed from a purported religious organization in the course of a criminal investigation. This Court held that where the State has a compelling interest sufficient to outweigh the possibility of an incidental infringement on First Amendment rights, there is no constitutional basis for withholding the subpoenaed records. *Worldwide Church of God, Inc.* v. *Superior Court of California for Los Angeles County,* —— U.S. ——, 48 USLW 3780 (Decided June 2, 1980) (Petitions for Writs of Mandate and/or Prohibition to set aside a series of discovery orders attendent to state investigation of church's financial affairs are denied); *Ambassador College* v. *Goetzke,* —— U.S. ——, 48 USLW 3536 (Church-related colleges claim that discovery during civil litigation of information relating to its organization, mode of operation, and tactics vis-a-vis securing execution of deeds and real estate trust agreements would violate its constitutional right to freedom of association would, if substantiated, relate primarily to admissibility in evidence of such information, but does not forbid its compelled production); *Rader* v. *California,* —— U.S. ——, 48 USLW 3258 (October 16, 1979) (Hearing denied on order that personal advisor to leader of religious society attend and answer questions propounded at deposition in connection with investigation into financial affairs of religious society).

These decisions in the specific context of subpoenas issued in the course of a criminal investigation for financial records of purported religious organizations, accord with the general principles of First Amendment Law. *Branzburg* v. *Hayes,* 408 U.S. 665 (1972). The State of New Jersey respectfully urges this Court to deny certiorari in the instant matter as it has in the aforementioned cases presenting identical issues.

POINT II

The challenged subpoenas are not overbroad nor are they violative of petitioner's First Amendment rights or his right of privacy.

The subpoenas in question were issued in the course of a State Grand Jury investigation into alleged criminal violations of N.J.S.A. 2A:111-1, obtaining money by false pretenses, by certain auxilliary organizations at the Freedom Church of Revelation. The subpoenas call for the production of financial records of these entities which relate to the alleged crimes under investigation. They do not call for the production of any materials related to the religious beliefs or acts of the subpoenaed entities.

> The free exercise is no talisman . . . which automatically protects religious organizations from any governmental regulation. The religious character of an organization does not provide a shield from regulation which in no way affects either religious beliefs or acts. *In re Rabbinical Seminary,* 450 F. Supp. 1078 (E.D.N.Y. 1978)

The instant case falls squarely within the holding of *In re Rabbinical Seminary.* While *Buckley* v. *Valeo,* 424

U.S. 1 (1976), stands for the principle that compelled disclosure of financial transactions and records "can infringe on privacy of association and belief guaranteed by the First Amendment," petitioner here has failed to demonstrate any such infringment on the record presented. This is in contrast to the factual basis of *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1957) on which petitoner purports to rely:

> [The N.A.A.C.P.] has made an uncontroverted showing that on past occasions, revelations of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. 357 U.S. at 462-63.

Even assuming that a showing of the subpoenas in some way burdens petitioner's right of privacy, disclosure of the subpoenaed records is justified by the compelling interest of the State in obtaining the financial records in question and the substantial relation between that interest and the records sought. *N.A.A.C.P.* v. *Alabama, supra,* at 463; *Buckley* v. *Valeo, supra* at 64-66.

Surinach v. *Pesquera de Busquets,* 604 F. 2d 73 (1 Cir. 1979), on which petitioner purports to rely, specifically exempts from its holding those cases in which the records of a religious organization are subpoenaed pursuant to a criminal investigation, a situation in which the State's interest is unquestionably "strong". (Cites omitted). 604 F. 2d at 80. "The investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen." *Branzburg* v. *Hayes,* 408 U.S. 665 (1972).

The documentation demanded in the challenged subpoenas clearly bears a substantial relation to the subject

matter of the criminal investigation. In this, the instant case parallels within the holding of *In re Rabbinical Seminary, supra.*

> The subpoenaed material all relates to the financial operations of the Seminary and of its students' loan transactions. There is no showing that the grand jury investigation is other than an inquiry into the possibility that the Seminary obtained funds by making false claims and subsequently misused those funds. 450 F. Supp. at 1083.

The subject of the instant investigation is not student loans but rather the obtaining of funds by the entities under subpoena through the false representation that persons purchasing ministerships could obtain tax deductions for non-religious expenditures. The factual situations between the two cases are parallel and the rationale of *In re Rabbinical Seminary,* is clearly applicable. The affidavit appended setting forth the facts giving rise to the instant criminal investigation on its face raises "sufficiently suspicious" circumstances justifying, and indeed requiring, a grand jury investigation. *Bursey* v. *United States,* 466 F. 2d 1059, reh. denied 466 F. 2d 1090 (9 Cir. 1972).

The subpoenas in question clearly meet the three-part test against which subpoenas must be measured when their reasonableness is challenged. First, as noted above, the requested material meets not only the "possible connection, but the substantial relationship" test in light of the affidavit appended describing the nature of the investigation. Second, the demanded documents are particularly described financial records. The particularity of the description clearly limits the demand to financial records and avoids any unnecessary entanglement in matters of belief or doctrine. Third, the challenged subpoenas

call for the production of financial records for two fiscal years. As noted in *In re Rabbinical Seminary, supra* at 1084, which upheld a subpoena for seven years of financial records:

> No magic figure limits the vintage of documents subject to a grand jury subpoena. The law requires only that the time bear some relation to the subject matter of the investgation. *In re Grand Jury Subpoena Duces Tecum,* 203 F. Supp. 575 (S.D. N.Y. 1961).

The subpoenas in question clearly meet this three-part test and allow the grand jury to examine the relevant financial data in its investigation.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY

FREEDOM INSTITUTE OF AMERICA et al.

v.

STATE OF NEW JERSEY

Affidavit of John J. Mercun, Esq., February 28, 1980

JOHN J. MERCUN, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a Deputy Attorney General for the State of New Jersey.

2. I have been assigned to investigate organizations claiming to be churches which promote the sale of church charters and ministers credentials. These organizations claim that an individual who purchases a ministry may reduce his tax liability, both State and Federal, by claiming tax exempt status as a religious organization. The investigation has reached a stage where it is presently pending before a State Grand Jury.

3. The promoters of these ("mail order") ministeries suggest that the individual purchasing the ministry and the organization he establishes as a result thereof needs to have no creed, dogma, moral code, and that the persons purchasing the ministry need undertake no specific duties

or responsibilities of a minister and these promoters often imply that these organizations can be operated solely to provide benefits to the individuals creating them.

4. The promoters of these plans often imply that the fact that organization from which the individual ultimately purchases the ministry has a tax exempt number automatically qualifies the individual for tax exempt status when, in fact, each new organization must make its own application for such a status.

5. The State Grand Jury's purpose in this investigation is to determine whether certain individuals and organizations were in violation of N.J.S.A. 2A:111-1 (Obtaining money by false pretenses) and N.J.S.A. 54A:9-15(a) (Attempt to evade tax) or may be in violation of N.J.S.A. 2C:20-4 (Theft by deception).

6. On July 12, 1979, the New Jersey Department of Consumer Affairs, Office of Consumer Protection, informed the New Jersey Division of Criminal Justice of the existence of a possible fraud and taking money by false pretenses related to the sale of ministeries in the Universal Life Church by Frank Conti, President of Freedom of Choice and Freedom Institute of America.

7. On May 1, 1979, a representative of the New Jersey Department of Consumer Affairs, Office of Consumer Affairs, attended an "opportunity meeting" conducted by Frank Conti at the Sheridan Inn, Hasbrouck Heights, New Jersey.

8. During the course of this meeting, Mr. Frank Conti represented that individuals could earn substantial tax savings by purchasing a ministry for Fifteen Hundred Dollars (1,500.00) in the Universal Life Church/Free-

dom Institute of America programs. Mr. Conti represented that as a minister, 50% of the individuals gross income could be donated to his "church". From this donation, the "church" could purchase homes, cars, vacations, etc. for the minister. Among the other benefits to be derived through the purchase of this ministry, as represented by Conti, are exemptions from Federal and State Income tax, exemptions from "Capital Gains" taxes, exemption from social security payments. It was also represented by Conti that the membership fee would be reduced from Fifteen Hundred ($1,500.00) to Twelve Hundred Dollars ($1,200.00) if an individual enrolled in this program within seven days of this meeting. Also outlined at this time was a commission program. A minister ($1,500.00 investment) would receive a twenty (20) percent commission for selling ministries in the Universal Life Church/Freedom Institute of America Program; a director ($2,500.00 investment) received a forty (40%) commission for the sale of these ministries. The audience was informed that these activities would be tax exempt because they were church donations since the money would be going from his "church" to the seller's "church".

9. As a result of this information, an investigator for the State of New Jersey, Division of Criminal Justice, attended an "opportunity meeting" at the Sheraton Inn, Hasbrouck Heights, New Jersey, held on August 21, 1979.

10. The August 21, 1979 meeting was conducted by Mr. Joseph Conglione and Mr. Frank Conti. In addition to the representations made at the May 1, 1979 meeting, Mr. Conti represented for example, that improvements on a "minister's" home (now the "parsonage") such as a "baptismal" pool would be paid for by the church, and therefore, tax exempt; the payment by the church for a con-

gregational meeting in Las Vegas "to convert the slot machines" would be paid by the "church" and therefore tax exempt. The fee for obtaining the ministry was now Sixteen Hundred and Ninety Five Dollars ($1,695.00). This fee was to be made as a donation to Freedom Institute of America.

11. On Monday, September 17, 1979, an article appeared in the Bergen Record, a newspaper, regarding Mr. Conti's operation. A copy of that article has been annexed to this Affidavit.

12. As a result of the foregoing, a state grand jury has commenced an investigation into the operation of Freedom Institute of America, Freedom of Choice, Universal Life Church, Frank Conti and other similar operations presently in existence throughout the State of New Jersey.

13. In connection with this investigation, the state grand jury has issued the subpoenas duces tecum which are now the subject matter of this application.

JOHN J. MERCUN
Deputy Attorney General

(Sworn to February 28, 1980)